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No. 84-676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court below properly applied the six-month statute of limitations established in DelCostello v. Int'l Brotherhood of Teamsters, 103 S.Ct. 2281 (1983) for hybrid breach of contract/duty of fair representation claims to bar identical claims against an employer and union subject to the Railway Labor Act which were not asserted until over two years after the last alleged wrongful act?

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Statement of the Case

On September 7, 1978, an arbitration board denied the grievance of Frank

Barnett, a flight attendant employed by United Air Lines, Inc. ("United"). Barnett first challenged that decision when he filed the present action on October 14, 1980 against United and the Association of Flight Attendants ("AFA"), asserting breach of contract and of the duty of fair representation. A. 40-42.[1] The District Court, in accordance with United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) ("Mitchell"), dismissed the action as untimely under the ninety-day limitations period in Colorado for an action to vacate an arbitration award. A. 42-43.

During the pendency of Barnett's appeal, this Court held in DelCostello v. Int'l Brotherhood of Teamsters, 103 S.Ct.

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[1]Citations of Opinions and Orders of the Court below are to pertinent pages in Petitioner's Appendix ("A.").

2281 (1983) ("DelCostello"), that a six-month statute of limitations should apply to hybrid breach of contract/duty of fair representation actions. Thereafter, the Court of Appeals for the Tenth Circuit applied DelCostello to identical hybrid claims presented in Barnett, finding no significance in the fact that the parties in Barnett were subject to the Railway Labor Act ("RLA"), while those in DelCostello came under the National Labor Relations Act ("NLRA"):

> "We find that the identical competing interests recognized in DelCostello are present in the instant action brought under the RLA. Section 10(b) of the NLRA is similarly relevant to a hybrid breach of contract/duty of fair representation claim brought under the RLA; thus, the reasoning and analysis of DelCostello control in the instant case. An employee like Barnett, therefore, who filed such a hybrid claim under the RLA in federal district court, must

> do so within the six-month period provided in §10(b) of the NLRA." A. 57-58.[2]

The Court affirmed dismissal of Barnett's action, filed long beyond the six month limitations period. A. 59. Barnett's Petition for Rehearing was denied. A. 60.

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[2]An earlier opinion by the Court of Appeals in Barnett (A. 20-38) failed to reference DelCostello (although AFA had urged DelCostello's applicability, Supplemental Brief, filed July 26, 1983), and instead affirmed dismissal because the action was not filed within the two year limitations period provided in 45 U.S.C. §153 First(r) of the RLA for actions to review orders of railroad adjustment boards. A. 25. After the Court received further submissions from the parties (AFA letters of March 26 and May 14, 1984, pursuant to FED. R. APP. P. 28(j); United Memorandum, filed on or about March 27, 1984; Barnett Petition for Rehearing), it withdrew and vacated its earlier decision, and applied DelCostello. A. 39, 49.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision Below, Applying DelCostello Retroactively, is Consistent With The Decisions of Nine Other Circuits and With This Court's Own Treatment of DelCostello

Barnett's argument that the Court below erred in applying DelCostello retroactively to bar his claims is contrary to the holdings of the appellate courts in ten circuits,[3] and to the general rule in favor of retroactivity. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281-82 (1969). Retroactive application of DelCostello also satisfies the standards of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). DelCostello did not overrule clear past precedent and

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[3]In addition to the Tenth Circuit's decision herein, the following have applied DelCostello retroactively: Graves v.

(footnote continued)

its retroactive application would further the federal interests in relatively prompt resolution of labor disputes and consistency embodied in DelCostello, and produce no substantial inequitable results. Graves v. Smith's Transfer

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(footnote continued)
Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984); Perez v. Dana Corp., Parish Frame Division, 718 F.2d 581 (3d Cir. 1983); Murray v. Branch Motor Express Co., 723 F.2d 1146 (4th Cir. 1983), cert. denied, 53 U.S.L.W. 3287 (Oct. 16, 1984); Edwards v. Sea-Land Service, Inc., 720 F.2d 857 (5th Cir. 1983); Curtis v. Int'l Brotherhood of Teamsters, Local 299, 716 F.2d 360, 361 (6th Cir. 1983); Ernst v. Indiana Bell Telephone Co., Inc., 717 F.2d 1036, 1038 (7th Cir. 1983), cert. denied, 104 S.Ct. 707 (1984); Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d 627 (8th Cir. 1983); Rogers v. Lockheed-Georgia Co., 720 F.2d 1247 (11th Cir. 1983), cert. denied, 53 U.S.L.W. 3287 (Oct. 16, 1984). Only the Ninth Circuit has held to the contrary. Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984).

Corp., 736 F.2d at 820-22; Perez v. Dana Corp., 718 F.2d at 584-88; Edwards v. Sea-Land Service, 720 F.2d at 860-63; Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d at 629-30; Rogers v. Lockheed-Georgia Co., 720 F.2d at 1249-50. Barnett cites no evidence of any "uniformity that already existed within Colorado law" prior to DelCostello. Petition ("Pet."), p. 15.[4]

Moreover, this Court applied the six-month limitations period retroactively to the claims before it in DelCostello, as several lower courts have observed. Welyczko v. U.S. Air, 733 F.2d at 241; DelCostello v. Int'l Brotherhood of Teamsters, 101 LC ¶11,190 at 22,875 (D. Md. 1984) (on remand); Graves v. Smith's

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[4]Cf. Edwards v. Teamsters Local Union No. 36, 719 F.2d at 1040 (asserted clear past precedent under California law prior to DelCostello).

Transfer Corp., 736 F.2d at 820; Lincoln v. District 9, Int'l Ass'n of Machinists, 723 F.2d at 630; Rogers v. Lockheed-Georgia Co., 720 F.2d at 1249. See also Int'l Brotherhood of Teamsters v. Edwards, 103 S.Ct. 3104 (1983) and District 1199, National Union of Hospital and Health Care Employees v. Assad, 104 S.Ct. 54 (1983) (vacating and remanding for further consideration in light of DelCostello).

The retroactive application of DelCostello does not present an issue warranting Supreme Court review.

II. There is No Conflict in the Circuits Regarding the Appropriate Limitations Periods for a Breach of Contract/Duty of Fair Representation Claim Under the Railway Labor Act Which Requires Supreme Court Resolution

Barnett asserts there is but "frail" and "superficial" appellate authority that the six-month limitations period adopted in DelCostello applies to breach of contract/duty of fair representation claims arising under the Railway Labor Act, Pet., p. 17, but five other circuits have joined the Court below in so holding. Welyczko v. U.S. Air, 733 F.2d at 240; Sisco v. Consolidated Rail Corp., 732 F.2d 1188, 1193 (3d Cir. 1984); Ranieri v. United Transportation Union, 743 F.2d 598, 600 (7th Cir. 1984); Hunt v. Missouri Pacific R.R., 729 F.2d 578, 581 (8th Cir. 1984); Barina v. Gulf Trading

and Transp. Co., 726 F.2d 560, 563 n.6 (9th Cir. 1984).[5] This "uniformity" of appellate authority, Pet., p. 17, is not undermined because a different limitations period may be appropriate for actions not involving hybrid breach of contract/fair representation claims. Cf. Pet., pp. 20-21.

Moreover, application of the same statute of limitations to hybrid claims under the RLA and the NLRA is entirely logical. The substantive standards for the duty of fair representation are identical under both statutes. See Int'l

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[5]Accord, Lang v. Consolidated Rail Corp., 579 F.Supp. 705, 708 (E.D. Mich. 1984); Ashby v. American Airlines, Inc., 115 LRRM 2522, 2523 (W.D. Tenn. 1983); contra Henry v. Air Line Pilots Ass'n, Int'l, 585 F.Supp. 376, 379-80 and n.2 (N.D. Ga. 1984) (relying on earlier (withdrawn) Barnett decision and noting anomaly of having different limitations periods for RLA and NLRA employees).

Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 46-48 and n.8 (1979). Compare, e.g., Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) and Czosek v. O'Mara, 397 U.S. 25 (1970) (RLA cases) with Vaca v. Sipes, 386 U.S. 171 (1967) and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (NLRA cases). See also Mitchell, 451 U.S. at 66 n.2 (Stewart, J., concurring). The same is true of the principles applicable to hybrid breach of contract/fair representation suits. Compare Czosek with Hines, cited in DelCostello. 103 S.Ct. at 2290-92. Both statutes present the same "'balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under a

collective bargaining system.'" DelCostello, 103 S.Ct. at 2294 (quoting Mitchell, 451 U.S. at 70 (Stewart, J., concurring)). A. 56-58.

Nor is Supreme Court review required to consider Barnett's attempt to substitute the two year period for vacating railroad arbitration awards, 45 U.S.C. §153 First(r), for the six-month DelCostello period. Section 153 First(r) is not "expressly applicable to some fair representation claims," Pet., p. 22, even where railroad arbitration awards are involved.[6] Ranieri v. United Transportation Union, 743 F.2d at 600. Cf. Pet., pp. 23-24 (citing only the withdrawn decision of the Court of

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[6]45 U.S.C. §153 is inapplicable to the airline industry. 45 U.S.C. §181.

Appeals herein).[7] As DelCostello cautions, analogizing an action to vacate an arbitration award (to which §153 First(r) is addressed) to a hybrid claim (such as presented here), is "problematic at best," 103 S.Ct. at 2292, because an arbitral panel "'could not resolve the employee's claim against the union.'" Id. (quoting Mitchell, 451 U.S. at 73 (Stevens, J., concurring in part and dissenting in part)). In addition, any use of "an arbitration limitations period" would result in "knotty problems

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[7]In Sisco v. Consolidated Rail Corp., the Third Circuit applied the six-month DelCostello period rather than §153 First(r) to a RLA breach of contract/duty of fair representation claim that involved a failure to pursue a grievance to arbitration. Contrary to Barnett's assertion, Pet., pp. 18-19, Sisco "did not reach the question whether [the six-month] period necessarily applies to a DFR action for the arbitrary or discriminatory litigation of a final board award." 732 F.2d at 1194 n.7.

of characterization and consistency," DelCostello, 103 S.Ct. at 2291 n.16, forcing a court to either treat unarbitrated grievances as if they had proceeded to arbitration, or to select different limitations periods for challenges to conduct at different stages of the grievance machinery when the substantive considerations are "not significantly different." Id. Cf. Pet., pp. 19, 21. Finally, use of the two year limitations period in §153 First(r), like "application of a longer malpractice statute as against unions," DelCostello, 103 S.Ct. at 2292 (which might be as short as one year, id. at 2292 n.18) "would preclude the relatively rapid final resolution of labor disputes favored by federal law." Id.[8]

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[8]Any issue concerning when Barnett's claims accrued, Pet., pp. 24-27, does
(footnote continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(footnote continued)
not present an independent ground for review, since suit was filed far longer than six months after Barnett's action accrued, however measured. Assuming, arguendo, that the two year limitations period of §153 First(r) instead applied, the suit would still be time-barred, as the Court below held in its original decision. A. 35-38. Accord, Gatlin v. Missouri Pacific R.R. Co., 631 F.2d 551, 554-55 (8th Cir. 1980).